Supreme Court, U.S.
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No. 97-399

In The

Supreme Court of the United States

October Term, 1997

MEHMET SEMIH SIDALI,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. Even though this case became moot through the passage of time, the Opposition nevertheless contends that mootness did not occur by happenstance because the Turkish trial court dismissed the charges against Mr. Sidali on his motion. Opp. Br. 8. This argument misses the mark as a matter of law, for under Article 117 of the Turkish Criminal Code ("TCC"), "The periods fixed by statutes of limitation for public prosecution *shall be applied by the court on its own motion.* Neither the accused nor the convict can waive this right." (App., *infra,* 151a-162a)[1] (emphasis supplied). In line with this provision, the Turkish trial court applied the statute of limitations *sua sponte* to dismiss the case against Mr. Sidali as time barred. (App., *infra,* 88a-90a). Indeed, that court's decision makes no reference to any motion by Mr. Sidali and, instead, consistent with TCC Art. 117, states, "[n]ow it has been observed that the statute of limitations has expired. Therefore, the court decided to dismiss the case on that basis and issued the following decision." (App., *infra,* 89a). Accordingly, as a matter of law, the dismissal of charges against Mr. Sidali resulted not from any action on his part but from the trial court's own application of the statute of limitations, as mandated by TCC Art. 117, given the passage of time. Furthermore, the government's attempt to impugn this legal conclusion by repeated references to Mr. Sidali's allegedly not having denied the government's contention that he sought such a ruling has no merit. Opp. Br. 6. Under TCC Art. 117, the trial court

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[1] Pagination of the appendix is continued consecutively from the appendix in the original petition for a writ of certiorari.

was required to apply the statute of limitations and the record is clear that this was done *sua sponte* and not on motion from Mr. Sidali.

2. More fundamentally, however, the government's argument on happenstance fails to acknowledge that the underlying cause of mootness was the passage of time, an elemental fact beyond Mr. Sidali's control. Indeed, the passage of time causing mootness stands in marked contrast to the kind of voluntary action that this Court has recognized would have an effect upon vacatur such as the resignation from employment in *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997) or the settlement in *U.S. Bancorp Mortgage Co. v. Bonner Mall*, 513 U.S. 18 (1994). Nor, for that matter, was there acquiescence in the Third Circuit's decision on the merits. *Compare* 15 Coquillette *et al. Moore's Federal Practice* § 101.97 at 101-83 (1997). In short, there was no "voluntary forfeiture of review." *U.S. Bancorp Mortgage Co.*, 513 U.S. at 26.

Furthermore, the Opposition seems to confuse the nature of the cause with the recognition of the effect. Yet to recognize that a case has become moot through the passage of time does not render the passage of time any less happenstance than filing a suggestion of death on the record would prevent death from being a cause of mootness by happenstance. If anything, the government's evident confusion on this point serves to underscore the need for clarification in applying the concept of mootness by happenstance. Moreover, the Opposition underscores the appropriateness of certiorari by highlighting the apparent tension between the denial of vacatur below and *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (*per curiam*), which vacated a court of appeals opinion holding the

defendant had a right to pretrial bail because the defendant's subsequent conviction mooted the issue of pretrial release, just as the trial court's decision dismissing the charges against Mr. Sidali mooted the issue of his extraditability.

In this connection, moreover, operating within the government's framework would make the government, which prevailed on the merits before the Third Circuit, the party causing mootness since the government urged that the case did not become moot until the government itself dismissed the extradition complaint. Furthermore, the government waited until October 1994 to commence this extradition even though extradition was first requested in February 1982 and in May 1993 the running of the statute of limitations by the end of March 1997 was expressly acknowledged. (App., *infra*, 53a, 64a-65a, 99a-101a).[2] Similarly, the government took the entire 60 days to file a notice of appeal in this case, did not move for expedited appeal, consented to Mr. Sidali's modest requests for an extension to file his brief, and did not move for immediate issuance of the mandate after the Third Circuit's February 24, 1997 opinion.

3. While recognizing the existence of conflicting cases, the Opposition seems to argue that vacatur following mootness by happenstance is not required in light of *U.S. Bancorp*. Opposition Br. 9. Yet this would hardly seem consistent with the teaching of *Arizonans for Official English*, 117 S.Ct. at 1071 that "[v]acatur is in order when

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[2] This delay was characterized by the District Court as one of "Rip Van Winkle-like proportions." (App., *infra*, 47a).

mootness occurs through happenstance. . . . " Moreover, after *U.S. Bancorp.*, the government itself had no difficulty in urging that "[w]here an appeal becomes moot after the court has issued its opinion but before the losing party can seek rehearing[3] and before the mandate has issued, the appropriate disposition is to vacate the panel's disposition and dismiss the appeal." Motion To Vacate Decision As Moot And Dismiss Appeal, *Humphreys v. Drug Enforcement Administration*, 105 F.3d 112 (3rd Cir. 1996) at 2. (App., *infra*, 154a).

The government also seeks to minimize the obvious conflict among the circuits by arguing that the conflicting cases antedate *U.S. Bancorp.* and may be limited by that decision. Opp. Br. 9. Yet such a claimed limitation was not recognized in the government's own motion to vacate the original *Humphreys* opinion, filed some two years after *U.S. Bancorp.*, while the Third Circuit, in denying the motion, openly acknowledged a conflict with sister circuits. 105 F.3d 116-117. (App., *infra*, 154a). Furthermore, in following close on the heels of *Humphreys*, which the government strongly urged below to deny vacatur, the panel's decision over the dissent by Judge Becker extends a clear conflict among the circuits that *Humphreys* itself had expressly noted. (App., *infra*, 77a, 80a, 84a).

Finally, the panel's decision in *Mahoney v. Babbitt*, 113 F.3d 219 (D.C. Cir. 1997) cited by the Opposition hardly reduces the conflict among the circuits evinced by *Clarke*

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[3] In Mr. Sidali's case the government urged that the dismissal of the extradition complaint and the charges in Turkey mooted out his petition for rehearing before the Third Circuit. (App., *infra*, 80a).

v. United States, 915 F.2d 699, 706 (D.C. Cir. 1990) (*en banc*). In both *Mahoney* and *Clarke* the government had sought vacatur of an adverse decision by the court of appeals, and *Mahoney* took care to distinguish *Clarke* on the grounds that the government in that case, like Mr. Sidali here but unlike the government in *Mahoney*, had not complied with the appellate decision sought to be vacated but, instead, had petitioned for rehearing. While *Mahoney* recognized that *U.S. Bancorp* may have limited *Clarke*, this was on an issue not relevant here, namely that the effect of precedential significance in a decision to vacate. *See also National Black Police Association v. District of Columbia*, 108 F.3d 346, 352 (D.C. Cir. 1997) relying upon *Clarke* after *U.S. Bancorp* to grant vacatur to government when legislation mooted the case.

If anything, moreover, the Opposition adds to the need for resolution of this conflict by reliance upon *Robinson v. California*, 371 U.S. 905 (1962) (*per curiam*), from which three members of the Court including Justice Harlan dissented, for there is certainly reason to believe that *Robinson* might well not be good law in light of *Arizonans for Official English*, since the mooting fact in *Robinson*, namely the death of the appealing party, occurred 10 days before filing of the appellant's jurisdictional statement but was not disclosed until after this Court's decision had been handed down. *Compare Arizonans for Official English*, 117 S.Ct. at 1069 ("facts that raise a question of mootness" must be brought to Court's attention promptly, with vacatur ordered for appellate decision issued after undisclosed mooting event). Indeed, *Humphreys*, 105 F.3d at

114, which was handed down before *Arizonans for Official English*, expressly relied upon *Robinson*. Furthermore, *Robinson* would appear to conflict not only with *Arizonans for Official English* but would seem to exist in tension with recent decisions of this Court where vacatur was granted when a case had become moot while a petition for certiorari was pending. Indeed, in those cases, just as in *Robinson*, no further review could be had at that point. *See, e.g., Joint School District 24 v. Harris*, 115 S.Ct. 2604 (1995) (in school prayer at graduation case, graduation occurs during pendency of certiorari petition and opinion below vacated by this Court); *Alabama v. Davis*, 446 U.S. 903 (1980) (opinion below vacated when case becomes moot during pendency of certiorari petition).

4. With respect to the legal harm that the denial of vacatur has imposed upon Mr. Sidali, the INS certainly does appear to have accorded preclusive effect to the decision by the Third Circuit and has not granted Mr. Sidali's naturalization application, while the government does not renounce any such preclusive effect as legally unwarranted. Furthermore, the government does not even abjure preclusive use of the Third Circuit's decision to seek Mr. Sidali's deportation as an aggravated felon in light of the panel's holding that he had been convicted. 8 U.S.C. § 1227(a)(2)(A)(iii) (West Supp. 1997). Moreover, given the government's present position that those whose deportation is sought on such criminal grounds under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 1672 cannot obtain judicial review even of the administrative determination that they are deportable as criminal aliens in the first place, Mr. Sidali runs the very real risk that any

challenge he might have to the preclusive effect of the Third Circuit's decision will never be heard by any court. *Compare Berehe v. INS*, 114 F.3d 159, 160 (10th Cir. 1997) (no judicial review of INS determination that alien deportable on criminal grounds barring judicial review) with *Yang v. INS*, 109 F.3d 1185 (7th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3414 (Dec. 15, 1997) (limited judicial review of whether alien deportable on criminal grounds barring judicial review). In short, this case presents a prime example where vacatur should be employed to clear the path for future relitigation given the harm facing Mr. Sidali. *Arizonans for Official English*, 117 S.Ct. at 1071. By contrast, the government has adduced no valid much less compelling reason for retaining the decision below, which the government itself characterized as "not otherwise remarkable or groundbreaking," though restating venerable precedent in the Third Circuit. (App., *infra*, 76a).

5. Finally, the Opposition fails to recognize that this case presents an issue that has already divided the circuits, namely whether a circuit opinion should be vacated when the case becomes moot after issuance of the opinion but before expiration of the time for seeking certiorari. In other words, this issue has occurred in at least four different circuits, the Eleventh, Ninth, District of Columbia, and Third, with the last circuit departing sharply from the prior three. Moreover, the magnitude and likely recurrence of this conflict is enhanced by the fact that *Humphreys* also conflicts with the government's own litigating position on this issue, as the government's motion to vacate in *Humphreys* confirms, while this litigating position has not changed since *U.S. Bancorp*. Given this intercircuit conflict, the government's contention that the

conflict is unlikely to recur in the exact same form as presented here is simply irrelevant, though, to be sure, one of those conflicting cases does arise from an extradition proceeding. *In re Ghandtchi*, 705 F.2d 1315, 1316 (11th Cir. 1983). Furthermore, the fact that a mooting event may stem from developments outside the litigation has certainly been a recurrent theme and, for example, was present in *United States v. Munsingwear*, 340 U.S. 36 (1950) itself, where the mooting event on litigation involving government regulations was the repeal of those regulations. Similarly in *Murphy*, 455 U.S. at 481, the mooting event on a civil rights action for pretrial release was the defendant's conviction in criminal proceedings.

In other words, some three years after *U.S. Bancorp.* an acknowledged conflict exists among the circuits and should be resolved. *See, e.g., Bryan v. United States*, 122 F.3d 190 (2d Cir. 1997), *cert. granted*, 60 U.S.L.W. 3411 (Dec. 15, 1997) (certiorari granted to resolve conflict among the circuits over knowledge requirement in prosecution under 18 U.S.C. § 922). Moreover the Opposition has highlighted the tension between the divergent Third Circuit precedent and *Murphy* as well as the possible conflict between *Robinson* and *Arizonans for Official English*, both of which factors underscore the appropriateness of certiorari. Indeed, this petition presents perhaps the first case to come before this Court since *U.S. Bancorp* where the mooting event was neither settlement, voluntary action of the prevailing party, nor compliance with the judgment sought to be vacated. Finally, given the extent to which the refusal to vacate below conflicts with the command of *Arizonans for Official English*, 117

S.Ct. at 1071, handed down after *Humphreys*, the Court may wish to consider summary reversal.

CONCLUSION

For the reasons stated here and in the petition, certiorari should be granted.

Respectfully submitted,

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APPENDIX Z

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Dismissal of Actions

* * *

running of the statute of limitations. Also, seizure of the convict for execution of the sentence regarding punishments restricting personal liberty interrupts the running of the statute of limitations.

If a person is convicted of an offense, and commits another offense of the same kind, while the statute of limitations was running, then the statute of limitations shall be interrupted.

115. Where the punishments of temporary disqualification to hold public office or disqualification to perform a profession or trade or any other punishment of disqualification are added to other punishments, or are incident to a conviction, such additional or incident punishments shall not be set aside, unless a period equal to twice the period of such additional punishments has elapsed and the statute of limitations starts to run on the date the principal punishment is set aside.

116. The periods fixed by statutes of limitation both for public prosecutions and for execution of sentences shall be computed in accordance with the provisions of Article 30.

117. The statute of limitations both for public prosecutions and for execution of sentences shall be applied by the court on its own motion. Neither the accused nor the convict can waive this right.

118. Felonies punishable by death, heavy life imprisonment or temporary life imprisonment, prescribed in Part 1 of Book Two of this code, if committed outside Turkey, shall not be subject to the statute of limitations.

119. Where the contrary is not specified by law, the public prosecution shall be dismissed, if the perpetrator of a misdemeanor punishable by a light fine of not more than 50 liras deposits in the concerned office, before the hearing, the maximum amount of the fine prescribed for the misdemeanor and the court expenses.

120. Setting aside of punishments imposed by a sentence will not dismiss the provisions of the sentence respecting private rights, recovery of property, payment of compensation and court expenses. However, dismissal resulting from amnesty shall dismiss even the Treasury claim for collection of court fees.

* * *

APPENDIX AA

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EARL A. HUMPHREYS, M.D.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 96-3099
	)	
DRUG ENFORCEMENT ADMINISTRATION,	)	
	)	
	)	
Respondent.	)	

MOTION TO VACATE DECISION AS MOOT AND DISMISS APPEAL

Respondent, Drug Enforcement Administration, by and through the undersigned attorney, respectfully moves this Court pursuant to Third Circuit Local Appellate Rule 27.4 to vacate its decision in this case as moot. As grounds for this motion, respondent states as follows:

1. This is an appeal of the Drug Enforcement Deputy Administrator's final order revoking petitioner's Certificate of Registration to prescribe controlled substances pursuant to 21 U.S.C. 824(a)(4). On September 17, 1996, this Court filed its decision vacating the Deputy Administrator's order and remanding the case to the agency. The government has until November 1, 1996, to file its petition for rehearing. Fed. R. App. Proc. 40.

2. Petitioner Earl A. Humphreys, M.D., passed away on Wednesday, September 25, 1996. See attached exhibit. Pursuant to 21 C.F.R. 1301.62, his Certificate of Registration terminated at his death. Accordingly, there is no "present controversy as to which effective relief can be

granted" and the appeal has become moot. See *Independent Union of Flight Attendants (IUFA)* v. *Pan American*, 966 F.2d 457, 459 (9th Cir. 1992).

3. Article III of the Constitution limits the jurisdiction of the federal courts to actual, ongoing cases or controversies. U.S. Const. art III, § 2; *Ivy Club* v. *Edwards*, 943 F.2d 270, 275 (3d Cir. 1991), cert. denied, 112 S. Ct. 1282 (1992); *In re Taylor*, 916 F.2d 1027, 1028 (5th Cir. 1990); *N.J. Turnpike Authority* v. *Jersey Central Power*, 772 F.2d 25, 30 N.10 (3d Cir. 1985). "This case-or-controversy requirement subsists through all stages of the judicial proceedings, trial and appellate." *Ivy Club*, 943 F.2d at 275.

4. Where an appeal becomes moot after the court has issued its opinion but before the losing party can seek rehearing and before the mandate has issued, the appropriate disposition is to vacate the panel's disposition and dismiss the appeal. See, *e.g.*, *Stewart* v. *Southern Ry. Co.*, 315 U.S. 784, vacating as moot, 315 U.S. 283 (1943); *Key Enterprises of Delaware, Inc.* v. *Venice Hospital*, 9 F.3d 893, 899 (11th Cir. 1993), cert. denied, 114 S. Ct. 2132 (1994); *IUFA* v. *Pan American*, 966 F.2d at 459; *In re United States*, 927 F.2d 626, 627 (D.C.Cir. 1991); *In re Ghandtchi*, 705 F.2d 1315, 1316 (11th Cir. 1983).

Accordingly, since this Court now lacks jurisdiction over the issue presented by this case, respondent requests that the Court vacate the panel's decision and dismiss the appeal.

In addition, respondent requests that the schedule for filing a petition for rehearing of the decision be stayed pending the Court's disposition of this motion.

Respectfully submitted,

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